IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-930

DIXIE LEE RAY, GOVERNOR OF WASHINGTON, ET AL,
Appellants,

v.

ATLANTIC RICHFIELD COMPANY, ET AL,
Appellees.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF MID-AMERICA LEGAL FOUNDATION AS AMICUS CURIAE

JOHN M. CANNON
Counsel for Amicus Curiae

MID-AMERICA LEGAL FOUNDATION
Suite 2245
20 North Wacker Drive
Chicago, Illinois 60606

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MOTION OF MID-AMERICA LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to this Court's Rule 42, Mid-America Legal Foundation (*"Mid-America"*) hereby moves the Court for leave to file the attached brief as *amicus curiae*. Consent was refused by counsel for appellant, Christopher T. Bayley, King County Prosecuting Attorney. *Mid-America* has received the written consents of the appellees, Atlantic Richfield Company and Seatrain Lines, Inc. and the appellants, Dixie Lee Ray, Governor of the State of Washington; Slade Gorton, Attorney General of the State of Washington; John C. Hewitt, Chairman, and Harry A. Greenwood, Benjamin W. Joyce, Philip H. Luther, and J. Q. Paull, Members, Board of Pilotage Commissioners; Coalition Against Oil Pollution; National Wildlife Federation; Sierra Club; and Environmental Defense Fund, Inc. Appellant, David S. McEachran, Whatcom County Prosecuting Attorney, has no objection. Copies of these letters have been filed with the Clerk.

Mid-America has an interest in the disposition of the case which is before this Court pursuant to the appeal from the judgment and opinion of the three-judge court for the Western District of Washington at Seattle in *Atlantic Richfield Company* v. *Evans,* F. Supp. , 9 E.R.C. 1876 (W.D. Wash., 1977) based upon the expertise and purpose of this organization. The brief urges the Court to affirm the judgment of the court below.

Mid-America was organized in late 1975 as an Illinois not-for-profit corporation to engage in non-partisan legal research, study and analysis for the benefit of the general public as to the effect of evolving concepts of law on our democratic institutions and to provide legal representation on matters of public interest at all levels of the judicial process. *Mid-America* takes special interest in questions of law of a national scope that have a direct effect on the mid-America region, namely, Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin. It has an interest in this case because the decision below interprets the Constitution of the United States and the Ports and Waterways Safety Act of 1972 in a way which will have far-reaching effects on the supply and cost of oil and related products to refineries and, consequently, the general public in the mid-America region.

Mid-America has carefully reviewed the jurisdictional statement and record, motion to affirm and related briefs filed in this Court and respectfully submits that its brief, lodged herewith, presents at least one relevant and significant question of law and an analysis of the related authority which was not presented by the parties. It therefore believes that this question would not otherwise be presented, or at least adequately presented with related authority, although it would be, at least alternatively, dispositive of the issue as to the invalidity of the legislation in question. It is the view of *Mid-America* that the state legislation in question violates the Commerce Clause of the United States Constitution and related Federal legislation

as did the state legislation involved in *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1 (1824), and that the interest of the public in non-coastal states, particularly mid-America, in the reasonable availability of Pacific ports for the ingress of Alaskan oil illustrates such violation and the need for the comprehensive national safety standards provided in the Ports and Waterways Safety Act of 1972.

Further, *Mid-America* believes that its argument that such considerations led to the adoption of The Constitution of the United States in place of the Articles of Confederation may be of value to the Court in its consideration of this case. *Mid-America* presents no separate statement with respect to the legal arguments briefed in the court below but concurs in the views of appellees thereon.

For these reasons, *Mid-America* respectfully urges the Court to grant this motion for leave to file the attached brief as *amicus curiae.*

Respectfully submitted,

John M. Cannon
Counsel for Amicus Curiae

MID-AMERICA LEGAL
FOUNDATION
Suite 2245
20 North Wacker Drive
Chicago, Illinois 60606

Dated: July 27, 1977

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BRIEF OF MID-AMERICA LEGAL FOUNDATION AS AMICUS CURIAE

Mid-America Legal Foundation ("*Mid-America*") submits this brief as *amicus curiae* in support of Appellees in this case. A motion for leave to file this brief as *amicus curiae* is submitted simultaneously with this brief.

INTEREST OF AMICUS CURIAE

The interest of the *amicus curiae* is stated briefly in its motion for leave to file this brief, which is bound together with this brief. The *amicus curiae* considers it appropriate to expand on that statement here.

Mid-America has an interest in this case because the decision below interprets the Constitution of the United States and Ports and Waterways Safety Act of 1972 in a way which recognizes the interests of non-coastal states in the reasonable availability of ports for their commerce. While this consideration has general application, the particular state statute here

in question, Chapter 125, Laws of Washington 1975, 1st Extraordinary Sess. Substitute House Bill No. 527, relates directly to the interest of all states in the "lower 48" other than California, Oregon and Washington in the reasonable availability of Pacific ports for the ingress of Alaskan oil, particularly those in mid-America facing the most acute shortage of oil.

Before the end of 1977, the output of Alaskan crude oil available for loading onto tankers at Valdez, Alaska is expected to reach 1.2 million barrels per day or more than twice the capacity of West coast refineries to handle the high sulphur Alaskan crude. West coast refinery capacity can handle less than one-third of the 2 million barrel per day final capacity planned for the Alaskan pipeline to Valdez. Meanwhile, the Midwest alone faces a crude oil shortage estimated at 1 million barrels per day and the Nation is currently paying out around 41 billion dollars per year to foreign oil producers without a practical solution being readily available to combat the personal and economic dislocations of any renewed embargo by foreign producers.

The foregoing dilemma has been the subject of extended current review not only within the petroleum industry but in the general circulation media. See *eg.* Chicago Daily News, June 22, 1977, "Big Alaskan Oil Need in Midwest"; U.S. News and World Report, June 20, 1977, "At Last Alaska's Oil Flows South" and "After Valdez: The Problems May Be Just Starting"; Chicago Tribune, April 7, 1977, "Supertankers Mean Superthreat in Shipping Alaskan Oil".

Basically, four solutions are currently discussed:

1. *International barter.* Trading Alaskan oil shipped to Japan for diverted Japanese controlled shipments from the Middle East to Gulf or East coast ports in the United States presents a potential for both environmentally and economically attractive solution. However, export of any U.S. reserves is thought to present problems of cogent

public explanation and credibility with respect to the energy crises generally. Barter of Alaskan oil shipped to Canadian West coast refineries for Canadian reserves in the mid-continent area would require prior conversion of the Canadian refineries to handle the high sulphur Alaskan crude in order to be workable.

2. *Tanker shipment to West coast ports followed by pipeline distribution.* A variety of proposals involving both old and new pipeline distribution from West coast ports are being studied and explored. The Washington statute involved in this case could affect directly the tanker shipments involved in a route from Alaska to mid-America through Puget Sound and a new pipeline across the "northern tier" of the Western United States to the Midwest. Another pipeline proposal for the distribution of Alaskan crude to the remainder of the Nation involves the reversal of an existing natural gas pipeline originally designed to flow westward from Texas toward California which is not currently in use. Were the Washington statute here involved allowed to stand, a similar statute in California could affect directly the tankers involved in that route from Alaska to the rest of the Nation. A variation of this proposal involves tanker shipment to Kitamat, British Columbia, a new pipeline to Edmonton and the use of existing lines from there to the Midwest.

3. *Trans Canada pipeline.* Pipeline transport directly from Alaska to the mid-continent area in the United States is a solution being discussed primarily in connection with natural gas rather than crude oil. The appellee, Atlantic Richfield Company, reportedly has suggested modification of Canada's Trans Mountain Pipeline which carries oil from Edmonton west to Vancouver to permit reverse flow of Alaskan oil from Vancouver to Edmonton and then through existing lines to the Midwest in order to more fully utilize the capacity of that existing system. The Washing-

ton statute here in question might directly affect this proposal since it applies to U.S. waters through which vessels pass at least occasionally enroute to and from Vancouver.

4. *Tanker shipment through the Panama Canal to Gulf and East coast ports.* In addition to the overall distance of shipment added by this roundabout route, the possibility of supertanker shipment from Alaska to Panama and from Panama to the Gulf and East coast ports with both onloading and offloading of smaller tankers capable of negotiating the canal in the Panama area presents the concomitant of environmental nightmares from dangerous operations of highly questionable necessity in negotiating a route of equally questionable necessity.

The foregoing summary of proposals receiving current media attention in the Midwest is not intended to be detailed or complete. Primarily, it reflects the deep concern created by the very real and serious oil shortage in mid-America. The environmental and economic costs of solution both in mid-America and along the potential routes to the oil fields of Alaska and elsewhere are also very real. While the statute here in question or similar legislation which might be enacted by any state having a West coast port would not be involved directly in the international barter and trans-Canada pipeline proposals, the ability of Midwest refiners and public to realize a fair share of the economic benefits in such solutions would be directly dependent on realistic availability of the alternative "all-American" solutions which would be effectively precluded or rendered significantly more costly by such state legislation.

ARGUMENT

1. The interest of the public in non-coastal states, particularly mid-America, in the reasonable availability of Pacific ports for the ingress of Alaskan oil illustrates the need for the national safety standards provided in the Ports and Waterways Safety Act of 1972.

The Ports and Waterways Safety Act of 1972, Pub. L. 92-340, 86 Stat. 424, confirms that comprehensive national standards were required, in the judgment of Congress, to prevent "environmental harm from vessel or structure damage, destruction or loss" in addition to the more traditional objective of preventing "damage to, or the destruction or loss of any vessel, bridge, or other structure on or in the navigable waters of the United States". Having stated in Section 101 of the Act that the purpose of the legislation was to prevent environmental harm from "vessel or structure damage", Congress went on in Section 102 to state that nothing in the title should *inter alia*, prevent a state or political subdivision thereof from prescribing "for structures only" higher safety equipment requirements or safety standards than those which may be prescribed pursuant to that title.

Such language is a clear application of the maxim "*expressio unius est exclusio alterius*". By utilizing the "structures only" language in Section 102 with the antecedent "vessel or structure damage" with respect to environmental protection in Section 101, Congress must be taken to have provided that the title does prevent any state or political subdivision thereof from prescribing higher safety equipment requirements or safety standards "for vessels", than those which may be prescribed pursuant to that title by the Secretary of the department in which the Coast Guard is operating. Such language is explicit. It is express and its legislative history unequivocally documents that it was precisely so intended. The House Report states that the language "is a positive statement retaining State jurisdiction over structures and making clear that State regulation of vessels

is not contemplated," and that "higher vessel equipment regulations and standards by States should apply to structures only and not to vessels." H.R. Rep. No. 92-563, 92d Cong., 1st Sess. 15 (1971).

Mid-America concurs in the legal arguments presented by the appellees to the three-judge court below and will not separately present such arguments. Instead, *Mid-America, as amicus curiae,* presents to the Court the interest of the public in states without Pacific ports in the reasonable availability of such ports for the ingress of Alaskan oil. *Mid-America* would note *arguendo* that such interest may be considered by this Court as relating only to the one-third portion of oil imported by the state of Washington which historically has been consumed in other states as recognized by appellants themselves. (Br. p. 83 n. 88). Nevertheless, *amicus* notes that by the end of 1977, West coast refining capacity of approximately 600 thousand barrels per day is expected to be able to handle only about one-half of the available Alaskan crude and less than one-third of the planned final capacity for the Alaskan pipeline to Valdez of 2 million barrels per day. Whether the exact interest of other states in the oil imports of Washington be "only" one-third or more than two-thirds, the significant point is that such tanker commerce in oil clearly and beyond question concerns more states than Washington. Furthermore, whether viewed historically in retrospect or prospectively in light of the reasonably anticipated potential, that portion which concerns other states clearly is substantial.

In *Gibbons* v. *Ogden* 22 U.S. (9 Wheat) 1 (1824) Chief Justice John Marshall explained that under the Constitution, the United States is a single nation as to "commerce which concerns more states than one." 22 U.S. at 194. Commerce among the several states does not "comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state,

and which does not extend to or affect other states." *Ibid.* The commerce here involved is not completely internal to the State of Washington. It is not carried on between man and man in that state, or between different parts of that state. On the contrary, the oil tanker commerce here involved both extends to and affects other states and even foreign nations. Clearly, under the teaching of *Gibbons,* the Washington statute purports to regulate "commerce which concerns more states than one" and as to which the United States is a single nation subject to exclusive regulation by the national government through Congress. U.S. Const. Art. I, Sec. 8.

The attempt of appellants to distinguish *Gibbons* on the ground that it "involved an express license to engage in interstate business between two points" (Br. pp 67-8 n. 75) is factually incorrect. This Court expressly dealt with such argument as follows:

> "The license must be understood to be what it purports to be, a legislative authority to the steam-boat Bellona, 'to be employed in carrying on the coasting trade, for one year from this date.'
>
> "It has been denied that those words authorize a voyage from New Jersey to New York. It is true, that no ports are specified; but it is equally true, that the words used are perfectly intelligible, and do confer such authority as unquestionably, as if the ports had been mentioned. The coasting trade is a term well understood. The law has defined it; and all know its meaning perfectly. The act describes, with great minuteness, the various operations of a vessel engaged in it; and it cannot, we think, be doubted, that a voyage from New Jersey to New York, is one of those operations." 22 U.S. at 214

Here, with the advent of the Alaskan oil bonanza in the midst of the national energy crisis and the reservation of transportation thereof for U.S. vessels, it cannot be doubted that voyages from Valdez to Puget Sound or to Long Beach or San Francisco are appropriate operations for any vessel "enrolled in the coastwise trade".

In *Gibbons* this Court struck down the New York steamboat monopoly legislation on the principle that acts of state legislatures which "interfere with, or are contrary to the laws of congress, made in pursuance of the constitution," are invalid under the Supremacy Clause. 22 U.S. at 211. There was no requirement for absolute inconsistency under any and all circumstances as urged by appellants and the *amici* briefs filed in support of their position. It was quite possible for a steamboat operator to comply with both the federal and New York laws. Indeed, many had. The core of unconstitutionality here is exactly the same as in *Gibbons*. Washington in 1977, just like New York in 1824, cannot exclude from its waters, which are also navigable waters of the United States, vessels which are duly enrolled and licensed to operate in the coasting trade under all applicable laws of the United States. No state may impose any additional requirements which "interfere with, or are contrary to" the authority and privilege which Congress has provided shall accompany due compliance with the federal law. In *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960), this Court recently reaffirmed the principle as follows: "A state may not exclude from its waters a ship operating under a federal license. *Gibbons* v. *Ogden*, 9 Wheat. 1." 362 U.S. at 447.

The original coasting act of 1789 was one of the first acts passed at the first session of the first Congress. See, An Act for Registering and Clearing Vessels, Regulating the Coasting Trade and for other purposes, approved September 1, 1789, First Cong., First Sess. Ch. 11, 1 Stat. 54. Thus, the principle reflected in the decision below that a state may not exclude from its waters a ship operating under a federal license which was first articulated for this Court by Chief Justice John Marshall in 1824 and specifically reaffirmed by this Court in 1960 can hardly be said to interfere with any "traditional" right of an individual state to protect its waters. Under the Constitution of the United States, there simply never has been any

such right as the State of Washington sought to exercise in the statute invalidated by the three-judge court below.

2. Such considerations led to the adoption of The Constitution of the United States in place of The Articles of Confederation.

Mid-America submits that the mistake of the Washington legislature in promulgating the subject law is analogous to the mistake of the English parliament in promulgating the tea tax and the Stamp Act. Whether tea or stamps were appropriate vehicles to raise revenue was a matter of little or no concern. On the other hand, the principle of taxation without representation sparked a revolution. Here the issues are not whether double hulls are reasonable requirements for tanker transport of oil or whether supertankers are altogether unreasonable for such purpose of Puget Sound. The issue is whether the people of mid-America and other states without Pacific ports shall have any voice or representation in the resolution of such questions.

The Senate Report on the Ports and Waterways Safety Act of 1972 is replete with detailed information pertaining to such matters. S. Rep. 92-724, 92nd Cong., 2d Sess. (1972), 1972 U.S. Cong. & Adm. News 2766 at 2771-2780. Nevertheless, Congress elected to authorize the Secretary of the department in which the Coast Guard is operating to consider such information, pursue its further amplification and development and promulgate rules and regulations to implement the same environmental safety objectives which the Washington legislation purports to serve. Congress pointedly refused to make the judgments reflected in the Washington statute. Instead, it authorized, but did not direct, the Coast Guard to do so and provided that it should implement its judgment only after appropriate notice and an opportunity for all interested parties to be heard. Uniform and identical standards for all ports are nowhere mandated. Uniform and comprehensive considerations and procedures are the requirements contemplated, not

identical rules applicable to every U.S. port regardless of its individual characteristics. The Constitution expressly precludes the preference of the ports of one state over those of another. U.S. Const. Art. I, Sec. 9. But equality or identity in every respect certainly is not required.

Thus, the mistake of the Washington legislature is not that it was wrong about oil tankers in Puget Sound anymore than parliment had been wrong about tea and stamps as vehicles to raise revenue, but rather that it precluded any voice or representation for the people of other states on matters directly affecting their commerce with states other than Washington and with foreign nations.

The disdain for jeopardy to the Union which Daniel Webster must have reflected when describing the retaliatory legislation of Connecticut and New Jersey in his argument on behalf of Gibbons is not difficult to imagine. 22 U.S. at 4-5. While no retaliatory action has been taken with respect to the subject Washington statute, Governor Thomas L. Judge of Montana recently voiced sentiments which could have led to such action in times past, when he observed that Washington benefits from energy which causes ,environmental harm to Montana and complained that Washington has prevented fuel from reaching Montana through Puget Sound. Environment Reporter, Current Developments p. 1682. (B.N.A. March 4, 1977).

Fully mindful of similar considerations which then had recently led to the American revolution and Declaration of Independence, the "Fellow Citizen" who authored "The Political Establishments of the United States of America, In a Candid Review of their Deficiencies, together with a Proposal of Reformation, Humbly addressed to the Citizens of America," (published in Philadelphia, in 1784, and republished with additions and alterations in 1787 in the New-Haven Gazette and Connecticut Magazine), observed in the installment published June 21, 1787, that

> "*Philadelphia*, and *New-York* import the principal part of the goods consumed in *Connecticut*, *New-Jersey* and *Delaware*, who consequently pay the duty on them; but *Pennsylvania* and *New-York* enjoy the benefits of it. So that this way and means of raising public monies, which ought to be applied to the benefit of the whole, becomes partial."

Francis N. Thorpe in his Constitutional History of the United States (Vol. I p. 279, Callaghan & Company, Chicago, Illinois 1901) observed that the last blow against the credit of the Confederation was the refusal of New Jersey to pay its quota of the Congressional assessment due to resentment against the power of New York to collect from inhabitants of New Jersey by means of duty on imports. The partiality observed as well as all comparable impositions by port states on non-port states later were expressly prohibited in the Imports and Exports Clause and the Duty of Tonnage Clause in the Constitution. U.S. Const. Art. I, Sec. 10.

The reflection of environmental concerns in the regulation of ports and waterways was recognized by the Congress as a new concept in 1972. However, appellants themselves as well as the *amici* supporting their position recognize the analogy of the burden on commerce inherent in the subject statute. (Aplts. Br. p. 83, n. 88, see also *e.g.* Am. C. Br. Calif. et al pp. 39-40). They argue, however, that such burden, though recognized as very real, falls primarily on persons subject to the jurisdiction of Washington and was not imposed for any evil purpose to favor its own commerce over that of any other state or nation. In earlier times such burdens were most frequently cast in the form of imposts or duties on imports or exports or a duty of tonnage. Under the Constitution, in marked contrast to the Articles of Confederation, no state is permitted to lay imposts or duties on imports or exports or a duty of tonnage without the consent of Congress. U.S. Const. Art. I, Sec. 10.

The arguments of the appellants and the *amici* supporting their position could be applied with equal logic to the pro-

scribed imposts and duties. New York quite likely consumed a greater portion of many imports taxed by them than did New Jersey. Furthermore, the use of imposts and duties to discourage certain items of commerce and, by exemptions, to encourage other items of commerce was not generally a problem under the Articles of Confederation. Comparable benefits and burdens on comparable items coming from or destined for other states under the Articles were generally and freely accorded. The problem, as explained by the "Fellow Citizen", *supra*, was the partiality which resulted from all of the benefits being received by a port state from a burden being shared proportionately with other states according to the use of the items involved.

Here the State of Washington has allocated unto itself most of the benefits which might be realized from the economic burden on the import of oil which will be shared proportionately by other states according to use. The other states might even agree that such sharing is fair and reasonable in view of the circumstance that Washington likewise would bear a disproportionate amount of the environmental harm sought to be prevented. What is improper in our federal system is for Washington, without the consent of Congress, to exclude any voice or representation for such other states in the decision of whether and how much of such a burden should be incurred. The Constitution provides explicit protection to Washington and every other port state against any preference to the ports of one state over the ports of any other state in any regulation of commerce or revenue. U.S. Const. Art. I, Sec. 9.

CONCLUSION

For the foregoing reasons, the decision below based upon the opinion of the three-judge court in the United States District Court for the Western District of Washington at Seattle should be affirmed.

Respectfully submitted,

JOHN M. CANNON
Counsel for Amicus Curiae

MID-AMERICA LEGAL FOUNDATION
20 North Wacker Drive
Suite 2245
Chicago, Illinois 60606